72-119

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-119

JOSEPH B. STAPLETON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Lawrence P. Brady, Jr.
921 Bergen Avenue
Jersey City, New Jersey 07306
Counsel for Petitioner

On the Petition:

John B. Wefing
40 Clinton Street
Newark, New Jersey

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No.

JOSEPH B. STAPLETON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Joseph B. Stapleton respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit, filed on May 22, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix hereto.

JURISDICTION

The Petitioner was charged with a conspiracy to violate Federal Laws, 18 U.S.C.A. Section 1951 and Section 1952 of the Hobbs Act, Section 371 of Title 18 as well as twenty-seven substantive violations of 18 U.S.C.A. Section 1951. Petitioner was convicted in the Federal District Court for the District of New Jersey and appealed to the Court of Appeals for the Third Circuit where an opinion affirming the decision was filed on May 22, 1972.

QUESTIONS PRESENTED

The Petitioner presents the following three questions:

1. Whether the admission of illegally seized evidence on cross-examination violates Fourth and Fifth Amendment rights.

2. Whether petitioner should have been given a hearing in the District Court to determine whether the evidence introduced was the fruit of an illegal search and seizure.

3. Whether a Grand Jury indictment obtained in an atmosphere of evident hostility, where a defendant is harassed, refused the opportunity to confer with counsel and in which illegally seized evidence is introduced, should be dismissed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., Amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Rule 41(e) Federal Rules of Criminal Procedure 18 U.S.C.:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 41(f) Federal Rules of Criminal Procedure 18 U.S.C.:

"(f) Return Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized."

STATEMENT OF THE CASE

The petitioner, Joseph B. Stapleton, was convicted under an indictment charging conspiracies to violate Federal Laws, 18 U.S.C.A. Section 1951 and Section 1952 of the Hobbs Act, Section 371 of Title 18, as well as twenty-seven substantive violations of 18 U.S.C.A. Section 1951.

From 1930 until the date of the trial, the petitioner was a career employee of the Hudson County Treasurer's Office. A man of modest means he was catapulted into an explosive, multi-million dollar conspiracy trial with seven other defendants, three of whom he had never even met, as the result of an illegal search of his office.

Stapleton's first encounter with the Federal authorities was on September 1, 1970 when he appeared before the Grand Jury. He requested an adjournment to obtain counsel six times and finally after certain threats and harassment by the Government, answered all questions posed to him. (At the time he was seventy-five years old and easily subject to intimidation, never having appeared in Court before.)

On October 8, 1970, on application of the United States Attorney, a search warrant commanding the search of the Petitioner's office was issued. Certain items were seized. The affidavit for the search warrant was immediately impounded on the ex parte application of the Government.

On November 5, 1970, the petitioner was recalled before the Grand Jury and after being informed that he was now a target of the investigation, was questioned extensively about the search.

On November 16, 1970, the petitioner was indicted. Repeated motions to obtain the affidavit were denied until after the trial had begun.

The Government agreed, prior to trial, to the suppression of the evidence and the petitioner's Grand Jury testimony, and no items which had been seized were introduced into evidence nor were any portions of the Grand Jury testimony read during the government's case. However, on cross-examination the petitioner was questioned extensively concerning the illegal raid on his office, as well as his Grand Jury testimony. Additionally, the petitioner repeatedly moved for a hearing to determine whether the evidence introduced by the Govern-

ment was the fruit of the illegal search and seizure. These motions were denied.

Upon conviction in the District Court for the District of New Jersey, a sentence of two years, six months of which was to be spent in confinement, was imposed. Thereafter, the Petitioner appealed to the Circuit Court of Appeals for the Third Circuit and his appeal was denied.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD GRANT PETITIONER'S REQUEST FOR CERTIORARI BECAUSE THE DECISION OF THE CIRCUIT COURT OF APPEALS ADMITTING ILLEGALLY SEIZED EVIDENCE ON CROSS-EXAMINATION GOES BEYOND ANY PRIOR DECISIONS OF THIS COURT AND VIOLATES PETITIONER'S RIGHT TO BE FREE FROM UNLAWFUL SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT AND RESTRICTS THE PETITIONER'S RIGHT UNDER THE FIFTH AMENDMENT TO TAKE THE STAND IN HIS OWN DEFENSE.

The Third Circuit Court of Appeals held that evidence obtained by an illegal search and seizure (30-31) was admissible in the cross-examination of a defendant who voluntarily chooses to take the stand in his own defense. This decision violates the petitioner's constitutional rights under the Fourth and Fifth Amendments. It renders the exclusionary rule adopted to protect Fourth Amendment rights almost useless and severely limits the petitioner's rights under the Fifth Amendment to take the stand in his own defense.

A. The decision of the Third Circuit expands the scope of Harris v. New York, 401 U.S. 222, 91 S. Ct. 644, 28 L. Ed. 1 (1971), to Fourth Amendment violations and distorts the intent of that case by nullifying the Fourth Amendment protections against unlawful searches and seizures.

Since the decision in *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) the exclusionary rule has been the indispensable method used by the Supreme Court and all other Federal courts to insure the rights of the citizens against arbitrary and unreasonable invasions of their privacy by Federal authorities. In *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) the Court found the exclusionary rule to be so necessary that the Court extended the requirements of the exclusionary rule to the State courts. In the instant case the Court of Appeals in a few brief lines has rendered this essential protection virtually meaningless. Al-

though there has been some criticism of the exclusionary rule, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (Justice Burger dissenting); *State v. Bisaccia,* 58 N.J. 586, 279 A. 2d 675 (1971), the Supreme Court has maintained the rule recognizing its vital function in deterring unlawful police activities. *Silverthorne Lumber Company v. United States,* 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920); *Elkins v. United States,* 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960); *Abel v. United States,* 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 38, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Until *Harris v. New York,* 401 U.S. 222, 91 S. Ct. 644, 28 L. Ed. 1 (1971) it was virtually assumed that the exclusionary rule meant what it said and that illegally seized evidence was inadmissible for all purposes. In *Harris,* supra, the Supreme Court in a 5-4 decision decided that under the restricted facts of that case, a statement made voluntarily and without coercion, but without one of the four Miranda (*Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)) warnings would be admissible on cross-examination for the limited purpose of impeaching the defendant's credibility. In the instant case the Court of Appeals has expanded and distorted the *Harris* concept by applying it to the Fourth Amendment protections. By such a radical incursion upon the exclusionary rule the Court has opened the door to unrestricted violations of Fourth Amendment rights. In making this expansive decision Judge Gibbons does not explore the differences between a technical violation of the Miranda warnings and lifting the restriction on the whole area of search and seizure violations. He merely states at page 30a, 31a:

> "Both (referring to Stapleton and Kropke) acknowledge that the seized evidence would, despite the Government's consent to suppression, be used for impeachment purposes. *Harris v. New York,* 401 U.S. 222, 226 (1971); *Walder v. United States,* 347 U.S. 62, 65 (1954)."

Petitioner contends that no such concession was made and that the illegally seized evidence could not be used for any purpose. Neither *Harris* nor *Walder,* 347 U.S. 62, 74 S. Ct.

354, 98 L. Ed. 503 (1954) require or even suggest that illegally seized evidence would be admissible.

In *Harris* the Court specifically noted that there was "no claim that the statements made to the police were coerced or involuntary" Id at 224, thus, implying a different outcome if there had been other violations of constitutional rights under the Fifth Amendment. If the confession had been involuntary under *Spano v. New York*, 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) or *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) the evidence illegally obtained would have still be inadmissible even on cross-examination. "Any statement made by defendant that is inadmissible because of lack of *procedural* safeguards required by Miranda may be used for impeachment purposes *if the trustworthiness of the statements satisfies legal standards.*" (Emphasis added) *Utsler v. Erickson*, 440 F. 2d 140, 143 (8th Cir. 1971). Therefore, *Harris* is in no way a general permission for the introduction of illegally obtained evidence. In dealing with coerced confessions the courts have consistently relied upon the voluntariness doctrine and only in 1966 adopted the Miranda rule to effectively achieve the purposes first espoused under the voluntariness doctrine. The decision in *Harris* thus recognizes Miranda to be only one means of protecting the voluntariness of confessions. The requirements under the Fourth Amendment dealing with search and seizure are essential constitutional values equivalent to the requirement of voluntariness. Certainly the Court in *Harris* which protected the voluntariness criterion was not intending to minimize the importance of the search and seizure protections of the Fourth Amendment. Therefore, notwithstanding the *Harris* decision (but see Justice Brennan's dissenting opinion with Justice Black, Douglas and Marshall concurring in dissent. *Harris*, supra, at 226) it does not support the position taken by the Court of Appeals.

The decision of the Supreme Court in *Walder*, supra, certainly does not justify the result in this case. In fact, it argues for Petitioner's contention when it says:

> "He (defendant) must be free to deny *all* the elements *of the case against him* without thereby giving leave to the Government to introduce by way

of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." (Emphasis added) Id at 65.

The Court then went on to allow the use of evidence dealing with a totally different offense occurring two years earlier to attack his broad statement that he had never possessed drugs. The evidence was admitted "solely for the purpose of impeaching the defendant's credibility." Id at 64.

Therefore, the *Walder* case was more in keeping with the general tradition of admitting evidence of prior convictions to test the credibility of the defendant. Since the basis of the admission was to test the credibility of the defendant the collateral nature of the testimony becomes important. When dealing with a collateral issue the danger that evidence admitted only to test the credibility of the defendant would be used to prove guilt is much less than in a case where it is contrary to aspects of the same case.

In *United States v. Fox*, 403 F. 2d 97 (2nd Cir. 1968) the Court recognized the distinction between the *Walder* case dealing with collateral issues and one dealing with evidence illegally obtained dealing with the exact same case. Respondent relies upon *Walker v. Follette*, 443 F. 2d 167 (2nd Cir. 1971) which apparently questions the validity of *Fox*, supra, but that case, like *Walder*, supra, dealt only with collateral cases.

In a very recent case of *Loper v. Beto*, __ U.S. __, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972) the Supreme Court reaffirmed its belief in protecting constitutional rights by refusing to allow convictions obtained in the absence of counsel to be used to impeach the credibility of the defendant. In that case the defendant took the stand in a case and was cross-examined on the basis of prior convictions obtained in the absence of counsel. The Court held "the use of convictions constitutionally invalid under *Gideon v. Wainwright* to impeach a defendant's credibility deprives him of due process of law." Id at 92 S. Ct. at 1019, 31 L. Ed. 2d at 381.

The Court stated in *Burgett v. United States*, 389 U.S. 109, 115, 88 S. Ct. 258, 262, 19 L. Ed. 2d 319, 324 (1967) and *United States v. Tucker*, __ U.S. __, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), as well as *Loper*, supra, that to allow

convictions obtained contrary to *Gideon* to be used in the trial for any purpose would weaken the effect of *Gideon*. In the instant case to allow the use of illegally seized evidence for any purpose would weaken the Fourth Amendment and the whole series of cases affirming the unconstitutionality of the use of illegally seized evidence.

In *Loper*, supra, there was a direct violation of Sixth Amendment rights, while in the present case there was a direct and admitted violation of fourth Amendment rights. In neither case should these violations be condoned by the fact that a defendant has exercised his constitutional right to take the stand.

Therefore, the instant case raises very clearly the constitutional question under the Fourth Amendment of the proper use of illegally seized evidence for the purpose of impeaching the defendant's testimony.

B. The decision of the Circuit Court raises substantial questions under the Fifth Amendment protections under self-incrimination since it infringes Petitioner's right to take the stand.

The protection against self-incrimination has been held to include the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

In *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) the Supreme Court held that prosecutors were not allowed to comment on the failure of the defendant to take the stand in his own defense. This was held to be necessary to protect the right of the defendant to take the stand or not without fear that his choice would prejudice his chances. In the instant case the defendant was placed on the horns of a dilemma. He could either remain silent and give up his right to testify in his own behalf or he could exercise his right and face the detriment of having illegally seized evidence used against him. Such a Hobson's choice should not be foisted on a defendant. He should be free as *Walder*, supra, says "to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it." Id at 65

This Court in recent opinions has recognized that a

defendant should not be placed in the quandry of choosing to exercise a constitutional right and thus losing another right. In *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) this Court held that a defendant may not be forced to choose between his right to a jury trial and the possibility of the death penalty. In *Funicello v. New Jersey*, 403 U.S. 948, 29 L. Ed. 2d 859, 91 S. Ct. 2278 (1971) reversing *State v. Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968), the Court held that the defendant cannot be placed in a position of having to choose between his right to plead not guilty and the possible death penalty. As Justice Brennan dissenting in *Harris* said "the accused is denied an 'unfettered' choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him." Id at 230

Here the Court of Appeals has gone beyond the decision in *Harris*, supra, and allows any illegally seized evidence to be introduced on cross-examination and thus has seriously reduced the right of the defendant to choose whether or not he will take the stand.

C. The Petitioner in this case did not voluntarily introduce the testimony contradicting the illegally seized evidence.

Assuming arguendo that illegally seized evidence may be used to impeach defendant's credibility on cross-examination, it can only be used if a defendant makes statements contrary to the illegally seized evidence. This immediately points out another difference between the cases dealing with *Miranda*, *Harris*, etc. and cases dealing with Fourth Amendment rights. *Harris* makes the point continuously about not allowing the defendant to make inconsistent statements and yet here we are not dealing with inconsistent statements but rather evidence obtained as the result of an illegal search thus the cases cannot even be discussed as parallel situations. The Court in *Walder* pointed out

> "Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics." Id at 65.

No such sweeping claims were made in the instant case. Judge Gibbons in responding to this contention in the Court below said:

> "The record discloses, however, that the testimony of each was substantially misleading and that the use made of the seized evidence was in the case of both properly impeaching. Moreover, in Stapleton's cross examination the first references to the seized materials was volunteered by him." 30a, 31a

This certainly does not meet the requirements of *Walder* of a sweeping denunciation or that the Government on cross-examination cannot ask a leading question designed to elicit the perjury. *Walder*, supra. In *Harris* the statement was made on direct testimony and not on cross-examination

In the instant case, the questions asked on cross-examination concerning the suppressed evidence can in no way be said to be connected with matters stated in direct examination. The defendant never made any mention in his direct testimony of the evidence which was unlawfully seized from his office.

In a case similar to the instant case, *Agnello v. United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1920), the police searched the apartment of the defendant and discovered a can of cocaine. It was then determined that the cocaine was inadmissible under the Fourth Amendment. On direct examination, Agnello admitted to having received some packages from a co-defendant but denied knowledge that they contained narcotics. The Government in cross-examination attempted to make use of the evidence by asking Agnello if he had ever seen narcotics and when he denied having seen any, the Government sought to introduce the illegally seized evidence in order to discredit the defendant. The Supreme Court rejected this method of introducing evidence in holding that:

> "And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he

had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search . . ." at 35.

The decision in *Walder* approved the decision in *Agnello* saying:

> "There the Government after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross-examination by asking the accused the broad question, "Did you ever see narcotics before?" After eliciting the expected denial, it sought to introduce evidence of narcotics located in defendant's home by means of an unlawful search and seizure, in order to discredit the defendant. In holding that the Government could no more work in this evidence on cross-examination than it could in its case in chief, the Court foreshadowed, perhaps unwittingly, the result we reach today. Id at 66.

Therefore, even assuming the admissibility of illegally seized evidence it was a constitutional violation of defendant's rights to introduce this evidence on cross-examination unless the Government can clearly demonstrate instances in which the petitioner on direct examination made broad sweeping generalizations contrary to evidence discovered in the illegal search and seizure.

D. The improper use of Grand Jury testimony relating to the illegal search and seizure on cross-examination raises constitutional issues under the Fourth and Fifth Amendments.

The Court in the instant case had suppressed Grand Jury testimony prior to trial. The Government was permitted to cross-examine the defendant, over objection by virtually reading into evidence a portion of his Grand Jury testimony which consisted of three pages. Therefore, the illegal, improper evidence which the Court agreed was inadmissible was used as evidence against the defendant. This again represented substantial incursions into the defendant's right to take the stand and the protections afforded defendant against improper use of

Grand Jury testimony. All the arguments raised in A, B, and C of Point I are applicable to demonstrate this unconstitutionality.

2. FAILURE OF THE COURT TO GRANT PETITIONER A HEARING TO DECIDE WHETHER EVIDENCE ADMITTED AT TRIAL WAS THE FRUIT OF AN ILLEGAL SEARCH WAS A VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS AND CONTRARY TO FEDERAL PROCEDURE.

It is now a general principle of constitutional law that testimony which is discovered as a result of the exploitation of an initially illegal search and seizure is inadmissible as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Smith v. United States*, 344 F. 2d 545 (D.C. Cir. 1965). This rule applies to verbal evidence as well as tangible evidence. *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963).

Rule 41(e) and (f) Federal Rules of Criminal Procedure provides a method for enforcing the protection against unreasonable searches and seizures. The Rule provides that anyone aggrieved by an unlawful search and seizure may move the District Court to suppress the use of anything illegally obtained. The petitioner in this case moved for a hearing to determine whether any of the evidence used by the Government was the fruit of the unlawful search and seizure. The trial court refused to grant such a hearing. In deciding whether or not to admit evidence, a hearing as to its admissibility should have been held. *United States v. Pardo-Bolland*, 229 F. Supp. 473 (S.D. N.Y. 1964); *United States v. Coplin*, 88 F. Supp. 921 S.D. N.Y. 1950); *Battle v. United States*, 345 F. 2d 438 (D.C. Cir. 1965); *United States v. Blalock*, 253 F. Supp. 860 (E.D. Pa. 1966). To promulgate a rule that the Government may not use the fruits of its illegal conduct without providing the means to ascertain the fruit would be to give the hunter a gun but no trigger with which to fire it. The Circuit Court of Appeals in examining this issue said:

> "The trial court declined to hold an evidentiary hearing because rather than Schuster's and Roetman's testimony being the fruit of the search it was

clear in the record that the search was the fruit of the information disclosed, prior thereto, by Schuster (Tr. 2556-63). The exclusionary rule operates on the fruits of the search, not the seeds."

The testimony is not at all clear that, in fact, the testimony was not the fruit of an illegal search

The denial of the hearing regarding Philip Schuster's statement was significant in that his testimony before the Grand Jury prior to the search was essentially negative while after the illegal search it became incriminating against the Petitioner. Additionally another witness, Linda Roetman, testified she was not contacted by the Government until late October, after the illegal search. It is significant to note that in the examination of petitioner before the United States Grand Jury after the illegal search, the Assistant United States Attorney referred repeatedly to information which was the result of the illegal search and seizure.

The trial judge at the time of his denial of the request for a hearing had no basis for his refusal to grant a hearing. The trial judge and the Circuit Court judge appear to rely upon the argument presented by the United States Attorney that the burden of proof was on the petitioner to show that the evidence was the result of an illegal search and seizure. In fact, the burden is upon the Government to show that the evidence was not the result of an illegal search and seizure. "The burden is on the Government to establish that the evidence it intends to offer to substantiate the charges in the indictment spring from independent sources, untainted by and not traceable to the unlawful interceptions." *United States v. Coplin*, 88 F. Supp. 921 927-8 (S.D. N.Y. 1950). In *United States v. Tane*, 329 F. 2d 848, 853 (2d Cir. 1964) the Court said:

> "The Government has failed to carry its burden of showing that the information gained from the wiretap did not lead, directly or indirectly, to the discovery of Pase and to Pase's willingness to testify." See also *Smith v. United States*, 344 F. 2d 545 (D.C. Cir. 1965).

As a result, at no time prior to trial, during trial or after trial, has the petitioner had the opportunity of determining what use, if any, the Government made of its illegal search.

Thus, the petitioner has been unable to ascertain whether or not fruits of the illegal search and seizure were admitted in evidence in violation of his constitutional rights under the Fourth Amendment, the due process clause of the Fifth Amendment and the established rules of the Federal Criminal Procedure.

3. CERTIORARI SHOULD BE GRANTED IN ORDER TO EXAMINE THE PROPRIETY AND CONSTITUTIONALITY OF THE CIRCUIT COURT'S OPINION WHICH UPHELD THE VALIDITY OF AN INDICTMENT WHICH WAS OBTAINED BY PRESENTING TO THE GRAND JURY ILLEGALLY SEIZED EVIDENCE' BY REFUSING TO ALLOW PETITIONER TO CONFER WITH HIS COUNSEL, BY THREATENING AND HARRASSING THE PETITIONER AND BY THE GOVERNMENT'S USE OF IRRELEVANT AND IMMATERIAL BUT PREJUDICIAL QUESTIONS.

A Grand Jury proceeding is an important and vital stage in a criminal case. It was originally adopted to protect private citizens from indictment by overly zealous police officers and prosecutors. "The most valuable function of the Grand Jury (has been) not only to examine into the commission of crimes, but to stand between prosecutor and accused." *Hoffman v. United States*, 341 U.S. 479 (1951) and citing to *Hale v. Henkel*, 201 U.S. 43 (1906). Although all the procedural safeguards of a trial are not necessitated, the Grand Jury proceeding must be fundamentally fair. In the instant case the use of illegally seized evidence, denial of counsel, improper and prejudicial questioning, and threats against the petitioner, all coincided to render the decision fundamentally unfair.

In *In re Grand Jury Proceedings, Harrisburg, Pennsylvania*, 450 F. 2d 3279 (1971) it was held that in a Grand Jury proceeding a witness could not be questioned concerning information discovered by means of unconstitutional wiretapping. Petitioner contends that the illegally seized evidence could not be used in the Grand Jury. The Circuit Court's decision attempts to distinguish the *Harrisburg* case on the theory that it deals with a particular statute and because it

deals with the privilege to refuse to testify rather than with dismissal of the indictment. It is difficult to imagine that the statutory language referred to in the *Harrisburg* case was intended to give the use of wiretap evidence a greater protection than that given to illegally seized evidence under the Fourth Amendment. The Court specifically notes the importance of rights under the Fourth Amendment. The Court below relied upon *Blue v. United States*, 384 U.S. 251 (1966), but the Court in the *Harrisburg* case said:

> "The context of the present case is substantially different from that of *Blue*, because Sister Egan is complaining of violations of her Fourth Amendment right, a right significantly different from that set forth in the Fifth Amendment. She is not attempting to block an indictment that might be returned by the grand jury but rather is asserting her right as a citizen to vindicate her privilege which protects her from unreasonable searches and seizures, regardless whether she will ever be indicted."

An analysis of the argument that a witness has the right to refuse to testify under a privilege brings out clearly the problem of this case where the petitioner was not permitted to confer with counsel and was not aware that the evidence was illegally obtained. A privilege to refuse to testify becomes an empty right when a defendant is not given the opportunity to learn that he had the privilege.

At his first appearance before the Grand Jury, petitioner six times requested permission to obtain counsel but was never permitted to do so. He was not informed of his Miranda rights, (See *State v. Sarcone*, 96 N.J. Super. 501, 233 A. 2d 406 (1967)) nor was he informed that he was a target of the investigation. Not only was there a refusal on the part of the Government to give petitioner an attorney but he was also harassed and threatened before agreeing to testify before the Grand Jury. (Petitioner's testimony indicates that he was told that if he didn't testify that he would get twenty years.) The threats and harassing techniques were directed at a seventy-five year old man without an attorney. The petitioner's will was overborne by the Government's influence which compelled him to incriminate himself before the Grand Jury.

Irrelevant and immaterial but prejudicial questioning was also utilized to bring about the Grand Jury indictment. The petitioner was questioned concerning unrelated political associations going back years before the indictment.

When the petitioner was brought before the Grand Jury for the third time he was questioned extensively concerning the illegal search and seizure. At this third session he was informed that he was a target of the investigation This indicates that the intervening illegal search was the factor which catapulted him into the indictment. Since petitioner was unable to see the affidavit which had been impounded, he did not have the opportunity to know in advance that the questioning was based on information obtained from an illegal search and thus, he was unable to claim his privilege. The Government, by its action had effectively precluded him from obtaining the documents that would have established the illegality both of the questions as well as the search.

Thus the position of the petitioner was, in fact, more difficult than that of the witness in the *Harrisburg* case in that he had no way of knowing that the information obtained was based on an illegal search and seizure, and had no opportunity to claim the privilege to refuse to testify. Not only were these unconstitutional activities factors in the issuance of the indictment, they were also introduced into evidence at the trial.

The Circuit Court's reliance upon *United States v. Blue,* 384 U.S. 251 (1966) and *United States v. Lawn,* 355 U.S. 339 (1968) is misplaced because those cases dealt with situations in which the only claim of injury was the use of illegally seized evidence. In the instant case the great number of prejudicial factors join together to make the indictment fundamentally unfair in violation of due process requirements; see *Hoffman v. United States,* 341 U.S. 479, 71 S. Ct. 814 (1951); *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

Therefore, this Court should dismiss the indictments as violative of petitioner's rights under the due process clause and the self-incrimination clause of the Fifth Amendment.

4. THE PETITIONER, JOSEPH STAPLETON, INCORPORATES BY REFERENCE WHEREVER APPLICABLE, THE ARGUMENTS, CONTENTIONS AND POINTS MADE BY OTHER PETITIONERS IN SUPPORT OF THEIR PETITIONS FOR CERTIORARI.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted

Lawrence P. Brady, Jr.
921 Bergen Avenue
Jersey City, New Jersey 07306
Counsel for Petitioner

On the Petition:

John B. Wefing
40 Clinton Street
Newark, New Jersey

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1886, 71-1887, 71-1888,
71-1889 and 71-1890

UNITED STATES OF AMERICA

v.

JOHN V. KENNY, THOMAS WHELAN, THOMAS FLAHERTY, WALTER WOLFE, JOHN J. KENNY, WILLIAM STERNKOPF, JR., FRED KROPKE, FRANK G. MANNING, JOSEPH STAPLETON, PHILIP KUNZ, JAMES R. CORRADO, BERNARD MURPHY

WILLIAM A. STERNKOPF, JR.,
Appellant in No. 71-1886

FRED J. KROPKE,
Appellant in No. 71-1887

JOSEPH B. STAPLETON,
Appellant in No. 71-1888

PHILIP W. KUNZ,
Appellant in No. 71-1889

BERNARD MURPHY,
Appelalnt in No. 71-1890

(D.C. Criminal No. 570-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued February 18, 1972

Before VAN DUSEN, ADAMS and GIBBONS,
Circuit Judges

OPINION OF THE COURT

(Filed May 22, 1972)

GIBBONS, *Circuit Judge.*

On November 16, 1970 a federal grand jury in Newark returned a thirty-four count indictment against John V. Kenny, Thomas Whelan, Thomas Flaherty, Walter Wolfe, John J. Kenny, William Sternkopf, Jr., Fred Kropke, Frank G. Manning, Joseph Stapleton, Philip Kunz, James R. Corrado and Bernard Murphy. Prior to trial the defendants Frank G. Manning, and John J. Kenny (no relation to John V. Kenny and called hereinafter J. J. Kenny) were severed and were granted immunity pursuant to 18 U.S.C. §2514. Corrado pleaded guilty to one count on May 21, 1971. During the trial, on June 11, 1971 John V. Kenny (hereinafter J. V. Kenny), because of physical inability to continue, was severed. At the close of the Government's case five counts of the indictment were dismissed on the motion of the Government. On July 5, 1971, the jury returned verdicts of guilty against seven of the eight remaining defendants on all twenty-nine remaining counts and against defendant Kunz on seventeen of those counts. Sentences were imposed on August 10, 1971[1] and all defendants except Wolfe appealed. Thereafter the defendants Whelan and Flaherty withdrew their appeals. Thus of the twelve named in the indictment the appeals of five, Sternkopf, Kropke, Stapleton, Kunz and Murphy, are before us.

Count I of the indictment charges that each of the

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[1] The court sentenced defendants Whelan, Flaherty and Murphy to terms of fifteen years imprisonment; defendant Sternkopf to a term of ten years imprisonment and a fine of $20,000; defendant Kropke to a term of five years imprisonment; defendant Stapleton to a term of two years imprisonment with eighteen months of that term suspended and three years probation; defendant Kunz to a term of two years imprisonment with eighteen months of that term suspended and two years probation; defendant Wolfe to a term of five years imprisonment with the entire term suspended and five years probation.

defendants, during the period from November 1, 1963 to the date of the indictment, conspired in violation of 18 U.S.C. §1951[2] to obstruct, delay, and affect interstate commerce by impeding construction undertaken on behalf of the City of Jersey City and the County of Hudson by contractors engaged in interstate commerce, in order to obtain the property of such contractors with their consent, which was induced both by the wrongful use of fear and under color of official right. Count II of the indictment charges that each of the defendants, during the period from November 1, 1963 to November 16, 1970, in violation of 18 U.S.C. §371[3] conspired to commit violations of 18 U.S.C.

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[2] "Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

[3] "Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

§1952[4] by using the facilities of interstate commerce to carry on an unlawful activity, that activity being the crimes of bribery and extortion in violation of the laws of the State of New Jersey. Thus the indictment charges violations of two separate federal conspiracy statutes; the specific prohibition in §1952 against conspiracies to obstruct, delay or affect commerce (Count I) and the general prohibition in §371 against conspiracies to commit an offense against the United States (Count II). The offense alleged against the United States in Count II is the substantive violation of §1952—interstate travel to commit extortion or bribery in violation of state law. Section 1952, unlike §1951, does not contain a specific prohibition against conspiracy. Section 1951 prohibits both substantive offenses and conspiracies. Counts III through XXXIV of the indictment each charges a separate substantive violation of §1951 by the extortion of a specific sum of money from a specific contractor.

Each of the defendants was, or had been, a highly placed public official or political leader in Jersey City or Hudson County or both. It was the federal government's theory that each acting in concert with one or more of the others used

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[4] "Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime or violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

his position to fasten upon both the city and county administrations a system whereby no one could do business with either without kicking back a percentage, usually 10%, of the contract price. According to the federal government this was achieved in three principal ways. First, the competitive bidding process was perverted by a "pre-qualification" arrangement which enabled the defendants to exclude from bidding contractors unwilling to kick back. Second, payments for work already done would be withheld until the kickback was made. Finally, on contracts not subject to competitive bidding the contract would not be awarded to anyone unwilling to kick back. At the head of this corrupt system, according to the federal government, was the defendant J. V. Kenny, who, although he held no public office or official party position in the years in question, was de facto the absolute boss of the political party in power. Under his leadership, it was contended, the defendants fastened a thoroughly meshed arrangement on both city and county administrations by which they subverted those governmental units into corrupt vehicles for their own private enrichment.

These contentions were amply proved by the testimony of numerous witnesses, but particularly by the testimony of the two defendants, Manning and J. J. Kenny, who as immunized witnesses detailed their own participation in the corrupt system, its methods of operation, its pervasiveness, and its long term success. The testimony of these acknowledged participants was corroborated in detail not only by the testimony of numerous victims, but by proof of the existence of substantial hoards of ill gotten gains accumulated by one or more of the participants. The proof in the record of the existence of a system for diverting the apparatus of city and county government to private, unlawful ends is overwhelming.

Each of the appellants, however, contends that as to him the proof was not all that overwhelming, that the government's case placed him at the periphery at best, and that he was prejudiced before or during the trial in various

ways. Most of the appellants urge common legal and factual issues, and these will be so discussed. Where the situation of any appellant is unique specific reference will be made to him.

I. Contentions with Respect to Discovery of the Government's Case

All defendants engaged in extensive pre-trial motion practice looking to discovery of the Government's case. That case was substantially documentary. The court ordered the Government, on defendant's motion, to permit them to inspect all tangible evidence related in any way to the case, to furnish in advance copies of any records which the Government might use at the trial and to furnish a copy of the grand jury testimony of each defendant who had testified before the grand jury. As it turned out, there was a room full of documents. This room was kept open to the defendants six days a week prior to the trial and even on Sunday during the trial. Several of the defendants contend that the court's approach was so overly liberal that they never made any meaningful use of the vast volume of materials made available. This contention is without substance. The nature of the conspiracy was such that it generated a great deal of tangible evidence, including $50,090.00 in currency, all of which was available for inspection. The only evidence which was not, pursuant to the court's order, available for inspection prior to trial, was evidence of certain transactions which did not come to the Government's attention until the trial was under way. The court gave the defendants an adequate opportunity during trial to prepare to meet any such later discovered evidence.

Several defendants contend that the court erred in denying their motion for a bill of particulars. The court in the exercise of its sound discretion declined to require the Government to answer a set of detailed interrogatories in the guise of a bill of particulars. This decision to permit liberal inspection of all tangible evidence placed a greater

burden of preparation on the defendants than would have been the case had their suggested course, requiring answers to a detailed bill of particulars, been followed. This, however, was a matter within the discretion of the court. The court leaned heavily toward liberal discovery throughout the case, and the defendants cannot be heard to complain about the balance of the burden of preparation which it struck between the prosecution and the defense. Ample opportunity for preparation was available, and from the evidence in the record was in fact availed of.

Defendant Stapleton contends that the court erred in denying his motion, pursuant to Fed. R. Crim. P. 16(a), for a copy of the statements of Government witnesses setting forth conversations with him. We rejected the same contention in *United States v. Fioravante*, 412 F.2d 407, 410 (3d Cir. 1969), *cert. denied*, 396 U.S. 837 (1969). Rule 16(a) does not require the discovery of witness statements. Those statements are governed by the provisions of the Jencks Act, 18 U.S.C. §3500. That statute was complied with during the trial.

Finally, defendants Kropke and Stapleton contend that it was error for the court to refuse discovery, prior to trial, of the contents of affidavits used to support the issuance of search warrants on October 8, 1971. The affidavit was on the Government's motion impounded in the interest of justice. The warrants directed the search of their offices. The defendants sought its inspection in connection with a proposed motion to suppress the fruits of the search. In response the United States Attorney urged that the motion to suppress be deferred until trial. He agreed to produce the affidavit at trial and represented that the Government would not object to the timeliness of the suppression motion at that time. Nevertheless Kropke and Stapleton made motions, pursuant to Fed. R. Crim. P. 41(e), for suppression. In response to these motions the United States Attorney stipulated that the Government would make no use of the materials seized in the search in its affirmative case at the

trial. In effect the Government, rather than disclose the contents of the affidavits, consented to the suppression motion. In these circumstances the court refused to permit pre-trial inspection of the affidavits.

Stapleton and Kropke contend, nevertheless, that they were prejudiced by the use of the seized evidence before the grand jury. But a defendant may not challenge an indictment on the ground that illegally obtained evidence was presented to the grand jury. *United States v. Blue*, 384 U.S. 251 (1966); *United States v. Lawn*, 355 U.S. 339 (1968); *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Rundle*, 383 F.2d 421, 424 (3d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968); *United States v. Grosso*, 358, F.2d 154, 163 (3d Cir. 1966); *rev'd on other grounds*, 390 U.S. 62 (1968). Stapleton and Kropke urge that the rule of these cases was changed by our decision in *In Re Grand Jury Proceedings, Harrisburg, Pennsylvania*, 450 F.2d 199 (3d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3279 (U.S. Dec. 14, 1971). That case turns on the provisions of a specific statute, 18 U.S.C. §§2514, 2515, and involves the standing of a witness, in that capacity, to refuse to testify before a grand jury. That issue is not presented in this record. Nothing in the *Harrisburg Grand Jury* case reflects upon the continuing validity of the rule of *Blue*, *Lawn* and *Costello* that a defendant cannot challenge an indictment on the ground that it was based on illegally obtained evidence.

In connection with the search warrant contentions of Stapleton and Kropke the federal Government makes the additional point that its consent to the suppression motion was not an acknowledgement that the affidavits were insufficient. The consent was made solely for the purpose of avoiding a revelation of the identity of a potential witness. It urges that an examination of the affidavits will disclose compliance with the formula set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964), explained in *Spinelli v. United States*, 393 U.S. 410 (1969) and possibly contracted in *United States v. Harris*, 403 U.S. 573 (1971). Because we

hold that *Blue*, *Lawn* and *Costello* control we do not reach that contention. At a later point we will discuss the use which was made at the trial of the materials seized pursuant to the warrants.[5]

II. Contentions Addressed to the Indictment

The appellants make a series of contentions addressed to the form of the indictment, the claimed variance of the proofs from the charge and the joinder of issues and parties. These may be categorized under the headings of vagueness, duplicity, variance and prejudicial joinder.

Vagueness

Sternkopf and Kropke urge that Count II of the indictment is vague as to contravene both the fifth and the sixth amendments. Kropke also contends that Count I is unconstitutionally vague. All the appellants have joined in these contentions.

The attack upon Count I requires no prolonged discussion. It is identical in all material respects with that approved in *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3395 (U.S. Feb. 22, 1972). Count II charges that the defendants:

> ". . . did knowingly . . . conspire . . . with each other, and with other persons . . . to commit certain offenses . . . in violation of Section 1952 of Title 18 . . . in that the defendants and said co-conspirators would travel and wilfully cause others to travel in interstate commerce and that they would use and wilfully cause others to use the facilities in interstate commerce . . . to promote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activing being the crimes of bribery and extortion in violation of the laws of the State of New Jersey, and it was further part of said conspiracy that the defendants

[5] *See* pp. 38, 39, 44 to 46 *infra*.

would thereafter perform and cause others to perform acts of promoting . . . of said unlawful activity and acts facilitating the promoting . . . of said unlaw activity."

Section 1952 in relevant part reads:

"(a) Whoever travels in . . . or uses any facility in interstate . . . commerce . . . with intent to —

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(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any acts specified in [subparagraph] . . . (3) shall be fined . . . or imprisoned . . .

(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery or arson in violation of the laws of the State in which committed . . ."

A substantive violation of §1952(a)(3) thus requires proof of interstate travel or use of interstate facilities with intent to promote extortion or bribery followed by attempts to perform such extortion or bribery. The indictment alleges all elements of this substantive offense in the language of §1952. It charges a conspiracy to violate that section between November 1, 1963 and the date of the indictment, and it alleges further that part of the conspiracy was the performance of other acts for the purpose of concealment.

Appellants contend that this indictment was so vague that it permitted the federal government to prove any extortion or bribery participated in by the alleged conspirators in violation of New Jersey law in the specified time period. This, they contend left the prosecutor free to prove offenses which had never been considered by the grand jury, thereby violating the fifth amendment guarantee that an accused charged with a serious crime be tried only on an indictment of a grand jury. They contend, moreover, that Count II did not set forth a "plain, concise and definite written statement of the essential facts constituting the

offense charged," Fed. R. Crim. P. 7(c), and thus violated their sixth amendment guarantee that they be informed of the "nature and cause of the accusation."

We hold that Count II complied with the standards set forth in *Hagner v. United States*, 285 U.S. 427, 431 (1932) and *Wong Tai v. United States*, 273 U.S. 77, 81 (1927). *See United States v. Dreer*, No. 71-1514 (3d Cir., filed Mar. 9, 1972). It charges the statutory crime in the language of the statute. It specifies the time period during which the conspirators are claimed to have acted. It both apprises the appellants of the charges against them and protects them against any future double jeopardy. *See United States v. Dreer, supra; United States v. Addonizio, supra; Vandersee v. United States*, 321 F.2d 57 (3d Cir. 1963); *United States v. Palmiotti*, 254 F.2d 491, 495 (2d Cir. 1958); *United States v. Achtner*, 144 F.2d 49, 51 (2d Cir. 1944). In affording such protection the indictment in this case differs crucially from that found defective in *United States v. Raysor*, 294 F.2d 563 (3d Cir. 1961). The contention that it permitted the proof of offenses not permitted to the grand jury is without substance. The federal government was required to offer to the grand jury some proof of the ongoing conspiracy alleged in Count II. It was not required to offer proof of every violation of New Jersey law which occurred as a result of that ongoing conspiracy. Evidence of some such violations did not come to the attention of the prosecuting authorities until after the indictment was returned. This evidence was, however, probative of the overall continuing conspiracy which the grand jury charged. Thus this case is not at all like *Stirone v. United States*, 361 U.S. 212 (1960), in which the grand jury charged a specific substantive interference with interstate commerce and the government proved a different substantive interference. Indeed the form of the indictment was compelled by the nature of the conspiracy. It was a conspiracy to exact a toll from everyone who could be made amenable to such an exaction by virtue of the defendants' control of the administrative apparatus

of local government. It is entirely likely that neither the grand jury nor the federal prosecuting authorities have not to this day discovered every instance of bribery or extortion by the conspirators in violation of New Jersey law. But the conspiracy to violate §1952 during the specified period was charged and was proved. The appellants cannot again be put in jeopardy for the same conspiracy even if new instances of violations of the New Jersey bribery and extortion laws in the same time period should now be discovered.

Duplicity

Appellants urge that because the federal government's position at all times was that there was a single overall conspiracy they were prejudicial by the fact that they were charged with two separate conspiracy counts. The maximum sentence under §1951 is twenty years, and none of the defendants received a sentence in excess of twenty years. A single general sentence was imposed. Since each sentence was less than the maximum permitted under §1951 the judgment should be upheld if conviction on the §1951 count is sustainable. *Barenblatt v. United States*, 360 U.S. 109, 115 (1959); *Roviaro v. United States*, 353 U.S. 53, 55-56 (1957); *Whitfield v. Ohio*, 297 U.S. 431, 438 (1936); *Claassen v. United States*, 142 U.S. 140, 147 (1891); *Peoples v. United States*, 412 F.2d 5 (8th Cir. 1969) and cases cited therein.

We need not rest affirmance on that ground alone, however. The single overall conspiracy violated two separate federal statutes prohibiting conspiracies. Count I charges a violation of the conspiracy prohibition in 18 U.S.C. §1951—conspiracy to interfere with interstate commerce. Count II charges a violation of the general federal conspiracy statute in 18 U.S.C. §371—conspiracy to violate a federal statute, in this case 18 U.S.C. §1952, by conspiring to use the facilities of interstate commerce to violate state law. Count I required proof of interference with interstate commerce by extortion. Count II required proof of use of the facilities of

interstate commerce. So long as each required proof of a fact not essential to the other, even though the charges arose from a single act or series of acts, or as here a single conspiracy, the defendants could be convicted of both. *Pereira v. United States*, 347 U.S. 1, 9 (1954); *United States v. Beacon Brass Co.*, 344 U.S. 43, 45 (1952); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Noveck*, 273 U.S. 202, 206 (1927); *Gavieres v. United States*, 220 U.S. 338 (1911); *United States v. Samuel Dunkel & Co.*, 184 F.2d 894 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951); *cf. United States v. Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969). Separate federal interests were invaded by the separate violation of two conspiracy statutes by a single conspiracy. *See American Tobacco Co. v. United States*, *supra* at 787.

Moreover each of these statutes permits a different range of sentence.[6] It was proper to charge both violations as separate counts of the indictment.

Variance

The appellants contend that their convictions should be reversed because of a fatal variance between the proofs adduced at trial and the indictment. To put this argument in perspective it must be recalled that in addition to the two conspiracy counts the indictment alleged thirty-two separate substantive counts charging separate extortive transactions with interstate contractors or suppliers in violation of 18 U.S.C. §1951. Evidence was offered tending to prove twenty seven of these counts, and most of that evidence tended to show concert of action between one or more of the defendants and hence to prove Count I. Evidence was offered with respect to many of these same transactions tending to prove that one or more of the defendants acting in concert caused

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[6] Not more than twenty years and not more than $10,000 under 18 U.S.C. §1951; not more than five years and not more than $10,000 under 18 U.S.C. §371.

the facilities of interstate commerce to be used in furtherance of the extortion, and hence to prove Count II. Thus this is not a case where there was no evidence of the existence of a conspiracy. *Compare United States v. DeCavalcante*, 440 F.2d 1264 (3d Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3221 (U.S. Nov. 9, 1971). The appellants claim, however, that although there was ample proof of concert of action, and ample proof of substantive violations of 18 U.S.C. §1951, and ample proof of use of the facilities of interstate commerce, and ample proof of bribery and extortion in violation of New Jersey law, the Government in fact proved several separate unrelated conspiracies under each conspiracy count. They argue that the proof established a Jersey City conspiracy to extort from contractors, a separate Jersey City conspiracy to extort from gamblers, a Hudson County conspiracy to extort from contractors, a separate conspiracy to extort from J. Rich Steers Company in connection with a Port of New York Authority contract, and a separate conspiracy to extort from Di Feo Motors. They urge that it was improper to lump together in one indictment several conspiracies, *Kotteakos v. United States*, 328 U.S. 750 (1946), and that by permitting proof of separate conspiracies the court permitted the Government to amend the indictment without resubmission to the grand jury. *Russell v. United States*, 369 U.S. 749 (1962).

Kotteakos prohibits charging multiple unrelated conspiracies, but it does not prohibit charging one master conspiracy and establishing at trial that under the master conspiracy more than one subsidiary scheme was involved. *Blumenthal v. United States*, 332 U.S. 539 (1947). Explaining *Kotteakos* in *Blumenthal* Justice Rutledge wrote:

> "Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement

with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single over-all comprehensive plan." 332 U.S. at 558.

Here there is ample evidence of a large general scheme, and of aid given by some conspirators to others in aid of that scheme. Each of the appellants was connected by evidence to the large general scheme. At the head of the scheme was J. V. Kenny who, the evidence suggests, ruled the political life of both city and county. Each of the remaining defendants held an official position in city or county government as a result of membership in J. V. Kenny's organization. He effectively determined who would hold public office in either government and he organized a system to insure that all contractors working on a public project would kickback a percentage of the contract price to a designated bagman. Generally speaking members of the city government would collect kickbacks from city contractors and members of the county government would collect from county contractors. But the roles played by various conspirators varied from time to time. Thus city collector Murphy was at one point replaced by Manning, who in turn was replaced by Flaherty. County collector Schlosberg was at his death replaced by J. J. Kenny, who was in turn replaced, after a falling out with J. V. Kenny, by Manning, who was eventually replaced by Wolfe. Manning, as County Engineer on occasion collected from firms which were performing city work. J. J. Kenny, a County Freeholder, on occasion collected from firms which were performing city work. The pattern of conduct reflected in the evidence is that of a determined group who repeatedly cooperated closely to achieve the common purpose of self-enrichment by extracting kickbacks. The key to success of all their depravities was their common control over the administration of city and county government under the leadership of J. V. Kenny. Without detailing all of the transactions, evidence about Ashland Oil Company, the subject of one of the substantive counts, discloses the typical

common ingredients. J. V. Kenny ordered the extortion; Sternkopf made the original demand. Sternkopf recruited Manning to make the collection, and Manning collected the money and turned it over to Wolfe. When the conspirators learned that Schuster, an Ashland employee, was appearing before the federal grand jury, Wolfe gave cash to Kropke to return to Schuster. Kropke attempted to do so but could not reach Schuster. He then returned the cash to Wolfe who returned it to Stapleton.

Manning and J. J. Kenny, the immunized co-conspirators, described the "system" or "official family" and the role of each defendant in it. It is clear from the evidence that none of the so called separate conspiracies could have operated except for the existence of the overall conspiracy charged by the grand jury. The court clearly charged that each defendant had to be connected with this overall conspiracy. This case is like *Blumenthal v. United States, supra,* rather than like *Kotteakos v. United States, supra,* upon which appellants rely.

Prejudicial Joinder

The appellants urge that the joinder Counts I and II of the indictment was improper under Fed. R. Crim. P. 8(a) and that the joinder of defendants was improper under Fed. R. Crim. P. 8(b). They contend that the district court erred in denying their Rule 14 motions for severance of offenses and for separate trials. These severance claims are predicated chiefly upon the allegedly prejudical effect of evidence admitted against some defendants which in the view of one or more of the appellants was inadmissible against him. Kunz and Kropke further contend that since they played only a minor part in the conspiracy their severance should have been ordered. We find no abuse of discretion. *United States v. Weber,* 437 F.2d 327, 331-32, 340 (3d Cir. 1970), *cert. denied,* 402 U.S. 932 (1971); *United States v. Barrow,* 363 F.2d 62, (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).

The evidence on the two conspiracy counts was essentially the same. The difference between them was that for Count I the government had to establish effect on interstate commerce while in the other it had to establish use of the facilities of interstate commerce. No possible prejudice arose from such evidence. It is true that Count II permitted greater latitude in proving substantive offenses against New Jersey law, since, if use of the facilities of interstate commerce was shown the Government could, and did, prove extortion from persons engaged in activities essentially intrastate. But the extortions in question were of the same character and grew out of the same overall conspiracy. Each involved misuse of the instrumentalities of government upon which the conspirators had fastened themselves. It was, therefore, no abuse of discretion to deny the motions to sever Counts I and II.

We turn, then, to the contention that some of the appellants should have been granted separate trials because of the prejudicial effect of evidence admitted against others which would be inadmissible against them. For two reasons we reject this contention. First, the mere possibility that in a joint trial some evidence may be admitted against one defendant which is inadmissible against another is not in itself a sufficient reason for multiple trials growing out of a closely related series of transactions. The prospect that certain evidence will be admissible against one defendant but not against another is a feature of all joint trials. Fed. R. Crim. P. 8 recognizes that this is a possibility, and Rule 14 commits to the sound discretion of the trial court the balancing of the inconvenience to the Government and the judicial process of numerous separate trials against the inconvenience to the defendants of seeking appropriate limiting instructions. *See, e.g., United States v. Barber*, 442 F.2d 517, 529 (3d Cir. 1971), *cert. denied*, 404 U.S. 958 (1971). There is no abuse of this discretion in the instant case. Second, the granting of separate trials would not have significantly benefited the defendants who now complain.

They would not have been able to compel self incriminating testimony of those co-defendants who in this trial declined to testify. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). *See generally United States v. Housing Foundation of America*, 176 F.2d 665 (3d Cir. 1949). There was some evidence linking each defendant to the conspiracy. *See United States v. Cohen*, 197 F.2d 26 (3d Cir. 1952). Thus the evidence of acts of all the co-conspirators in furtherance thereof would be admissible against them. *See, e.g., United States v. Weber, supra; Baker v. United States*, 401 F.2d 958, 974 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970); *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964).

The real thrust of the appellants' objections to their joint trial is that the rules of evidence pertaining to conspiracy trials operated harshly, particularly because the out-of-court declarations of each co-conspirator became admissible against each other co-conspirator. We are, of course, mindful of the dangers of unfair guilt by association involved in the law of criminal conspiracy. In the instant case, however, there was evidence linking each of the appellants to the conspiracy, although in varying levels of participation.[66] In these circumstances, the evidence rules applicable to conspiracy trials did not operate unfairly. Indeed, this case illustrates the pervasive danger to the community of conspiratorial associations and thus hardly presents a sympathetic vehicle for the reconsideration of the co-conspirator admissions rule, even if we, as opposed to a higher authority, were free to change that rule.

III. Contentions Addressed to Admissibility of Evidence in the Government's Case

All the appellants complain about various items of evidence admitted during the Government's case. Much of

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[66] These degrees of participation were recognized in the varying sentences imposed. *See* Note 1 *supra*.

the evidence consisted of shocking revelations by the two immunized co-conspirator defendants, J. J. Kenny and Manning.

A. Evidence of Concealed Wealth

Among the more sensational items of evidence were those establishing the existence of large concealed wealth in the possession or control of one or more of the alleged conspirators. The court admitted in evidence $700,000 in bearer bonds belonging to J. V. Kenny. It admitted evidence of a secret numbered bank account in Miami, Florida, controlled by Whelan and Flaherty, containing $1.2 million. It admitted in evidence $50,090.00 in currency which was given by J. V. Kenny to J. J. Kenny in February 1971, after the indictment, for the purpose of "investigating" and "discrediting" Manning, who by then was suspected of being a potential witness. It admitted testimony that Sternkopf assisted J. J. Kenny to invest substantial funds which the Government contends were proceeds of the crimes charged.

Appellants urge, on the authority of *Williams v. United States*, 168 U.S. 382 (1897) that all the foregoing evidence was improperly admitted because no connection was shown between the possession by the defendants of the sums specified and the extortions for which they were indicted. We have held that sudden unexplained acquisition of wealth at or about the time of the offense charged establishes a sufficient nexus to satisfy the rule of *Williams, supra. See United States v. Chaney*, 446 F.2d 571 (3d Cir. 1971); *United States v. Jackson*, 403 F.2d 647, 649 (3d Cir. 1968), *cert. denied*, 394 U.S. 949 (1969); *United States v. Howell*, 240 F.2d 149, 158 (3d Cir. 1956). We have also held that evidence of a desire to conceal a large sum of money shortly after a crime sufficiently establishes the connection required by *Williams. United States v. McKenzie*, 414 F.2d 808 (3d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970). *See also United States v. Jackskion*, 102 F.2d 683 (2d Cir.), *cert. denied*, 307 U.S. 635 (1939); *Commonwealth v. Mulrey*, 170 Mass. 103, 49 N.E. 91 (1898). Measured by the rules

which this circuit has followed there was in each of the four instances complained of sufficient evidence connecting the money to the conspiracy.

(1) The J. V. Kenny Bonds

J. V. Kenny arranged during the pendency of the charged conspiracies surreptitious transfers of currency for the acquisition of bonds, through the Trust Company of New Jersey, utilizing the services of Kropke and Sternkopf. Brill, an officer of the Trust Company of New Jersey, testified that Sternkopf called him on the telephone to arrange for the purchase of $200,000 worth of New Jersey Turnpike Bonds. Sternkopf told Brill that a representative of J. V. Kenny would arrange for payment. On October 4, 1966 Kropke brought to the bank $200,870.84 in currency. J. V. Kenny later personally picked up the bonds from Brill after they were delivered to the bank by Lehman Brothers, the underwriter. An official of Lehman Brothers, Ragsdale, testified that after the purchase he had a conversation with Sternkopf in which Sternkopf expressed extreme displeasure over the fact that Lehman Brothers put J. V. Kenny's name on the bill. Sternkopf directed Lehman Brothers "never to put John V. Kenny's name on any such bill" in the future. In May, 1967, J. V. Kenny decided to purchase $200,000 worth of City of New York bonds. Kropke brought Brill $200,000 in currency. After receipt of the bonds from New York Brill personally delivered the bonds to J. V. Kenny at Corrado's office in Pollak Hospital. In April, 1968, Sternkopf telephoned Brill regarding the purchase of $100,000.00 of County of Loran, Ohio, bonds. Brill went to Sternkopf's office, and Sternkopf gave him $102,365.97 in currency, Brill delivered the bonds to Sternkopf. In July 1968 Sternkopf again called Brill and arranged for the purchase of $200,000 worth of New Jersey Turnpike bonds. Brill arranged for the delivery of the bonds from New York and delivered them personally to Sternkopf, receiving $200,000 from him in currency.

Brill testified that all the bonds were "bearer bonds",

that all were delivered from New York (as charged in Count II), that in each instance the Trust Company of New Jersey as agent for J. V. Kenny paid for the bonds by a bank treasurer's check, thus concealing the fact that J. V. Kenny had available for such purchases during the period when the conspiracy was operating over $700,000 in currency. There was evidence that all kickbacks were made in currency. These transactions were amply connected to the conspiracy. *United States v. McKenzie, supra; United States v. Jackskion, supra.* They were evidential of the knowledge and participation of Kropke and Sternkopf in that conspiracy. *United States v. Addonizio,* 449 F.2d 100, 102 (3d Cir. 1971); *United States v. Barrow,* 363 F.2d 62 (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).

(2) The Whelan and Flaherty Accounts

The immunized defendant, Manning, testified:

"Q. Did you ever have any conversation with defendant Flaherty in reference to any of the proceeds of the contractors' envelopes?

A. Yes, sir, I did.

• • •

Q. In substance what did the defendant Flaherty say to you and what did you say to him?

A. He and Mayor Whelan were very disturbed about the opposition on the Hill, referring to the County organization, that they think we are stupid. They are the stupid ones. They stashed their cash in local banks. He said that we put ours in the bank owned by a friend of mine outside the State. (Tr. 3985)."

Later in the trial Dennis Clum, senior Vice President in charge of the Trust Department of the Miami Beach First National Bank testified that James Rogers of that bank, formerly an officer of the First National Bank of Jersey City, introduced him to Flaherty at his office in Miami on November 14, 1968. Flaherty asked if the bank would open a custodial account which would be identified by a number so that his name would not be associated with the account.

Clum advised that the bank could open such an account. Flaherty then opened a brown attache case which contained $281,000 in municipal bearer bonds and $242,897 in currency, for a total of $523,897. On many of the bearer bonds the interest coupons had not been clipped since 1966. The accumulated uncollected interest was about $13,000. On September 12, 1969 Flaherty returned to Clum's office, this time in the company of Whelan. Flaherty introduced Whelan and said he wanted to open a similar numbered account in which his name would not be disclosed. Whelan had in his possession municipal bearer bonds of a face amount of $502,000. A numbered custodial account was opened for him. Flaherty instructed the bank to transfer bonds of an equivalent amount of $45,000 from his account to Whelan's. Thereafter on another occasion Whelan and Flaherty came to the bank with their wives and executed agreements whereby each of them and their respective wives would have the right to add to or withdraw from the other's account. On February 2, 1970 Whelan deposited $35,000 in currency in his numbered account and Flaherty deposited $40,000 in currency in his numbered account. On May 13, 1970 Whelan and Flaherty each deposited $30,000 in currency in their respective numbered accounts.

In late May or June, 1970, after the federal grand jury investigation of Hudson County and Jersey City had begun, Flaherty called Clum and said he wanted to close both accounts. He told Clum he would send Atkinson, a Jersey City police sergeant, to Miami to pick up authorizations for his and Whelan's signatures. Atkinson went to Florida, picked up the authorization forms, returned to Jersey City and obtained the signatures of Whelan and Flaherty. He returned to Florida on June 12, 1970 with a large suitcase and the executed authorizations. Clum delivered to Atkinson from Flaherty's account $571,000 of face value municipal bearer bonds, a check on principal cash in the amount of $30,025 and a check representing accumulated income of $13,270.36, or a total of $614,295.36. From Whelan's

account he delivered municipal bearer bonds in face amount of $577,000, a check drawn on principal cash in the amount of $35,025, and a check representing accumulated income of $6,112.94 or a total of $618,137.94. The four checks totaling $84,433.30 had not been negotiated when Clum testified on June 22, 1971.

Manning's testimony connected Flaherty's and Whelan's out of state bank accounts with the conspiracy. But aside from that testimony the existence of large and unexplained amounts of cash and bearer bonds simultaneously with the offenses and the efforts at concealment provide an ample nexus with the conspiracy. *United States v. Chaney, supra; United States v. McKenzie, supra; United States v. Jackson, supra; United States v. Howell, supra.* Indeed the efforts at concealment of the cash hoards were, as alleged in Count II of the indictment, for the purpose of hiding and concealing the purposes of and acts in furtherance of the conspiracy.

(3) The Cash Given by J. V. Kenny to J. J. Kenny

The immunized defendant J. J. Kenny testified that on February 3, 1971 after the indictment, and at a time when he had broken with the organization headed by J. V. Kenny, and before he began cooperating with the Government, he met with J. V. Kenny at Newark Airport and asked J. V. Kenny for $50,000. He told J. V. Kenny that he needed this sum to hire investigators and accountants.

"Q. Did you tell him why you wanted to hire investigators and accountants?

A. Yes, I told him I needed the money and I wanted to spread it to a fellow by the name of Frank Manning." (Tr. 1096-97)

Three days later J. J. Kenny received a message from someone named Pandolphi, telling him to go to a garage. He went to the garage and Pandolphi gave him $50,090 in currency. Thereafter he began cooperating with the Government and he turned the money over to the *United States Attorney.*

Each bill was marked,, and the $50,090 was offered and received in evidence. Frank Manning, of course, is the other immunized co-defendant. J. J. Kenny testified that he discussed with J. V. Kenny the use to which the money was to be put.

"The Witness: The purpose was to hire investigators, accountants, to discredit Mr. Manning.

Q. Was there any discussion as to why you wanted to discredit Frank Manning?

* * *

The Witness: The discussion was to discredit Mr. Manning. He was one of the defendants at the time.

Q. Did you have any discussion with Mr. John V. Kenny as to why Manning should be discredited?

* * *

The Witness: The discussion was that he was the party that we had to discredit." (Tr. 1116-1118)

The appellants urge that the admission of the foregoing testimony and evidence was grounds for a mistrial. They contend that it was perfectly proper for J. J. Kenny, in connection with the preparation of his defense to the indictment, to hire "investigators and accountants" to discredit Manning, and that it was perfectly proper for J. V. Kenny to give J. J. Kenny $50,090 for this purpose. The evidential use to which the Government put the funds, they contend, somehow infringed the right of J. J. Kenny and J. V. Kenny to prepare a defense. But neither Kenny is before us advancing this contention, and the prejudice, if any, must have been to the appellants before us for us to consider it.

The issue is whether the testimony was properly admissible against anyone, since on the record in the district court it is clear that the objections made on behalf of the appellants were to any admission of the evidence. There was no request for a limiting instruction to the effect that the

testimony and the currency could only be considered against some defendants.[7]

It is clear that the furtive transfer of $50,090 in currency from one conspirator to another conspirator for the purpose of discrediting a potential government witness certainly was evidence of consciousness of guilt on the part of the two defendants who participated in the transactions, and thus was admissible against the defendant J. V. Kenny. Next, the ready availability of a $50,090 hoard of currency was highly corroborative of the testimony of J. J. Kenny that the conspirators had extorted millions of dollars of currency which they secreted for their own use. Thus the evidence corroborated his testimony about the operation and success of the system which he described. As such it was admissible on the conspiracy counts against all the conspirators. Finally, the ready availability to one of the conspirators of $50,090 in cash and its transfer to another conspirator at a time shortly after the period during which the conspiracy is alleged to have continued,[8] as with other evidence of large unexplained hoards of currency, tended to establish the offenses charges. *United States v. Chaney, supra; United States v. McKenzie, supra; United States v. Jackson, supra; United States v. Howell, supra.*

Moreover the clandestine transfer of $50,090 in currency from one conspirator to another certainly suggests an effort to conceal its existence. Appellants urge that the only possible construction which may be placed on the testimony is that the money was for legitimate pre-trial preparation by J. J. Kenny. Arguably that was the case, but the circumstances suggest Judge Learned Hand's aphorism,

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[7] At the time J. J. Kenny gave the testimony from which the excerpts quoted above were taken defendant J. V. Kenny had not been severed.

[8] Count II alleges that the conspiracy began on or about November 1, 1963 and continued up to and including the date of the indictment.

"[t]here may be honor among thieves, but there is no maudlin munificence." *United States v. Compagna*, 146 F.2d 524, 530 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

Testimony about the $50,090, and the currency, were properly admitted.

(4) The Investments in C.E.W. Corporation Made By J. J. Kenny with Sternkopf's Help.

Sternkopf in particular claims that it was error to admit evidence that he assisted J. J. Kenny in making a concealed investment in C.E.W. Corporation. To put that objection in context it should be recalled that there is other evidence connecting Sternkopf to the conspiracy as early as October 1966. See p. 25 *supra*. Moreover before the evidence now complained of was admitted J. J. Kenny had testified about specific extortive transactions involving J. Rich Steers Corporation in which Sternkopf was a participant. Early in 1967, while Sternkopf was the Vice Chairman of the New Jersey Turnpike Authority, Galano, of the Steers firm, told J. J. Kenny he had been to see J. V. Kenny about obtaining a ten million dollar contract with that Authority, that he was interested in turnpike work, and that J. J. Kenny was to see if he could get it for Steers. J. J. Kenny met with Sternkopf and they agreed the Turnpike Contract was worth $50,000.00. J. J. Kenny then met with Galano and Rau, the president of Steers, and negotiated for a $50,000 kickback. Steers got the job and beginning in January 1968 paid the money in installments. One half of each installment was paid to Sternkopf and the other half to Stapleton, the treasurer for the system. Though the payments were made in 1968, Sternkopf's participation began in early 1967. The C.E.W. transaction took place in 1967. J. J. Kenny told Sternkopf that he had some "cash" he wanted to invest. Dooley, J. J. Kenny's brother-in-law, had succeeded Sternkopf as Clerk of the Hudson County Board of Chosen Freeholders on Sternkopf's recommendation. J. J. Kenny told Sternkopf he wanted Dooley to act as his agent in the investment. He gave Dooley $65,000 in currency and

a $16,000 check which he had obtained from a friend in exchange for $16,000 in currency. A property in South Jersey was purchased in the name of "C.E.W. Coporation" with Clarence Sprinkle, Edward Dooley and William Sternkopf disclosed principals. Dooley, however, was a nominee for J. J. Kenny, because, as Kenny declared, "I couldn't show that kind of cash." (Tr. 1079). Sternkopf made the arrangements, transmitted the cash and the $16,000 check for purposes of closing and received a twenty per cent interest in C.E.W. without making any investment.

Sternkopf would have us hold that the cash invested in C.E.W. was not sufficiently connected with the conspiracy, and improperly tied him into admitted extortions by J. J. Kenny. There was, however, ample evidence that in 1967 Sternkopf was a knowing participant in the system and in the efforts of its members to secrete the proceeds of their joint efforts.

When he took the stand in his defense Sternkopf insisted that J. J. Kenny was not a principal in C.E.W., and that he was merely aiding Dooley, a legitimate businessman. The J. J. Kenny version differs. It made Sternkopf a knowledgeable participant in efforts to conceal the fruits of the conspiracy. The conflict between the two versions was for resolution by the jury.

The evidence of concealed wealth was in each instance properly admitted.

B. The Di Feo Testimony

J. J. Kenny testified, without objection, that Di Feo Buick sold tires and cars to Hudson County and to Jersey City and that the owner, Sam Di Feo made kickbacks to him which, pursuant to the arrangements of the system, he turned over to Stapleton. (Tr. 1007-8) Di Feo, called by the Government, demanded and received immunity. Without objection he testified that he gave cash kickbacks to J. J. Kenny on cars sold to Hudson County, on cars sold to Jersey City to Murphy, and on cars ordered by Kunz for the Jersey

City Sewerage Authority to Flaherty. Still without objection he testified:

"Q. In 1969 what position, to your knowledge, did Fred Kropke hold in Hudson County?

A. He was the Chief of Police for the County.

Q. Did there come a time when you had any dealings with him in reference to some police cars for the Hudson County Police Department?

A. Well, he ordered ten police cars and I delivered the police cars. After that I had to give him two other cars, one was for himself and one was for Captain Robbins.

* * *

"Q. Did the defendant Kropke give you any instructions as to the bill for the Datsun for himself and the Oldsmobile for Captain Robbins?

A. He instructed me to bill these things to the County.

Q. Did he tell you how to bill it to the County?

A. As police cars." (Tr. 2103-04)

The Government then offered Exhibit 2165, the invoice to the County for the two cars falsely described as Buick specials. For the first time the defendants objected to the admission of the exhibit on grounds of relevancy. The objection was overruled and the invoice received in evidence. Di Feo then testified without objection:

"Q. Did Chief Kropke tell you why he wanted the invoice filled out that way?

A. So the County could pay for both cars." (Tr 2105)

The invoice, amounting to $5,327.80, was paid by the county.

There was no request for any limiting instruction at the time of the testimony, and no objection to the testimony. On appeal several defendants urge plain error. Fed. R. Crim. P. 52.

We see none. Clearly the kickback testimony was proof of the existence of the conspiracy alleged in Count II. These

were crimes of extortion or bribery under the laws of the State of New Jersey. The testimony with respect to the false invoices for cars delivered to Kropke and Robbins did not, technically, establish the offense of extortion or bribery under New Jersey law, since Di Feo was paid by the County. The district court recognized as much when at the end of the case it charged:

> "Ladies and gentlemen, my attention has been directed to the fact that I said the property in question here was money and in the case of Di Feo automobiles. Upon giving further thought to this I will eliminate 'automobiles,' because I do not recall any testimony of an instance where Mr. Di Feo didn't get paid for the automobile. Regardless of where the automobile went afterwards the County paid for it, but the automobile wasn't extorted from him. There is evidence that money was extorted from him." (Tr. 6833).

Kropke was a member of the official family who owed his position as Chief of the Hudson County police to J. V. Kenny. He was deeply involved in J. V. Kenny's efforts to conceal the cash loot of the conspiracy. He was in the position to perpetrate the venal fraud described in the Di Feo testimony only because the system of which he was a part had diverted the administration of county government to its private ends. Even if the Di Feo-Kropke transaction is regarded as a separate sub-conspiracy it is adequately connected to the one grand conspiracy in which all the defendants joined under the leadership of J. V. Kenny. *Blumenthal v. United States, supra.*

Moreover, against Kropke, the evidence, even if considered not a part of the overall conspiracy charged, was admissible, within the discretion of the trial court, as proof of motive, opportunity, intent, plan, knowledge and absence of mistake. *See* Rule 4-04, *Proposed Rules of Evidence for the United States District Courts* and Magistrates (1971); *United States v. Hamilton*, No. 71-1400 (3d Cir., filed Feb.

14, 1972); *United States v. Weiler*, 385 F.2d 63 (3d Cir. 1967); *United States v. Klass*, 166 F.2d 373 (3d Cir. 1948). The appellants can hardly claim there was an abuse of such discretion when by failing to object they never presented the issue to the district court.

Finally, even if the evidence were not properly admissible against Kropke, and we have held otherwise, its admission against him, with no request for a limiting instruction from the remaining defendants, is as to all of them at worst harmless error, Fed. R. Crim. P. 52(a), rather than plain error. Rule 52(b).

IV. Contentions Addressed to the Government's Cross Examination of Defense Witnesses

The appellants contend that several prejudicial errors took place during the Government's cross examination of defense witnesses.

A. Use of Suppressed Materials

We have referred heretofore, to the fact that the Government, rather than disclosing the contents of affidavits used to obtain search warrants, agreed that it would make no use of the materials seized in its affirmative case. The searches and seizures were made at the offices of Stapleton and Kropke. Both took the stand and testified. Both were confronted on cross examination with the seized materials in order to impeach their direct testimony. Both acknowledge that the seized evidence could, despite the Government's consent to suppression, be used for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 226 (1971); *Walder v. United States*, 347 U.S. 62, 65 (1954). Both now contend that their direct testimony was in no way impeached by the seized evidence and that its use was therefore improper. The record discloses, however, that the testimony of each was substantially misleading and that the use made of the seized evidence was in the case of both properly impeaching. Moreover in Stapleton's cross examination the first reference to the seized materials was vol-

unteered by him. There was no error in the use made of the suppressed materials on cross examination.

B. The Larner Report

A former Governor of New Jersey, Robert B. Meyner, testified as a character witness for Sternkopf. He testified as to Sternkopf's reputation for honesty, integrity and veracity. On cross examination he insisted he had never heard anything bad about Sternkopf and he volunteered that he had him checked out quite throughly before appointing him, on the recommendation of J. V. Kenny to the New Jersey Turnpike Authority. Mr. Meyner was then confronted with sections of a report on an investigation into the municipal affairs of Jersey City made in 1954 and commonly known as the Larner Report. Prepared at the order of the Superior Court of New Jersey, it reflected quite adversely upon Sternkopf's performance as the supposedly independent City Auditor. Sternkopf contends this kind of cross examination of a character witness was impermissible. We have held otherwise. *United States v. Polack*, 442 F.2d 446, 477 (3d Cir. 1971), *cert. denied*, 403 U.S. 931 (1971). The scope of cross examination was within the sound discretion of the trial court. That discretion was not abused here. The cross examination went to Mr. Meyner's knowledge of Sternkopf's reputation and to Mr. Meyner's standard of good repute.

C. Krope's Financial Condition

On his direct examination Kropke admitted delivering the attache case full of cash from J. V. Kenny to Brill. *See* p. 25 *supra*. He admitted that he attempted, after the grand jury investigation was underway, to return to Schuster of Ashland Oil $9,000 of a $10,000 payment which had been obtained from Ashland, acting at the direction of Wolfe. In these transactions, he contended, he was an innocent and unknowledgeable participant. He ended his direct testimony by asserting that he never took a dollar from any of the contractors doing business with Hudson County. He

complains on appeal that he was cross examined about his financial worth and his expenditures and that in such cross examination the Government made use of his income tax returns. The returns were used only to refresh his recollection as to his reported income, and no claim was made that they were false. The cross examination was proper. Kropke, holding a trusted appointive law enforcement position in a governmental apparatus which, the evidence disclosed, had been largely diverted from the purpose of public service to that of private gain, had participated in the efforts of some of the co-conspirators to secrete the loot, and had participated in the efforts of others, when the grand jury investigation was in progress, to return some of the extorted funds to Ashland Oil Company. In the face of such evidence it was proper for the court to permit the Government to test the credibility of his protestations of non-participation by seeking to establish the sources of his expenditures during the years in question. The bounds of such cross examination was a matter for the discretion of the trial court. *United States v. Greenberg*, 419 F.2d 808 (3d Cir. 1971). No abuse of that discretion appears in this record.

D. The Court's Refusal to Recall a Government Witness

Appellant Murphy contends that it was error for the court to refuse to recall the witness Manning, at the end of the case, nine days after he had completed his testimony, for further cross examination. The alleged purpose of the additional cross examination was to attack Manning's credibility by showing that he had been the indirect recipient of money from Girard Engineering Co., one of the extortion victims. The documents upon which this cross examination was proposed to be based were available to counsel at the time of the original cross examination. In that cross examination the credibility of Manning, the immunized defendant and admitted co-conspirator was attacked literally for days. The scope of cross examination

on credibility issues was within the discretion of the trail court. The privilege of recross examination *a fortiori* ". . . lies within the trial court's discretion." *United States v. Stoehr*, 196 F.2d 276, 280 (3rd Cir.), *cert. denied*, 344 U.S. 826 (1952).

We have considered each other reference to alleged improper cross examination or limitation on cross examination asserted by any defendant, and in the light of the record we find no abuse of discretion with respect to the permitted scope of examination, and no error.

V. Sufficiency of the Evidence

The only appellants who contest the sufficiency of the evidence to support the jury verdict are Kunz and Kropke. We have heretofore in other context discussed the evidence connecting Kropke to the conspiracy. *See* p. 40 *supra*. That evidence looked at with a view most favorable to the Government was sufficient to present a jury question and to support the verdict on which Kropke was convicted. *United States v. Alper*, 449 F.2d 1223, 1227 (3rd Cir. 1971); *United States v. Carlson*, 359 F.2d 592, 597 (3d Cir. 1966). Measured by the same test the evidence connecting Kunz to the conspiracy, though concededly not as strong as that tying in the other defendants was also sufficient. Once the conspiracy is established, as here it was abundantly, only slight evidence is necessary to support a jury verdict that an individual defendant was a member. *United States v. Addonizio*, 449 F.2d 100, 102 (3d Cir. 1971); *United States v. Weber*, 437 F.2d 327, 336 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971); *United States v. Bey*, 437 F.2d 188, 192 (3d Cir. 1971).

From July 1, 1965 to July 1, 1969 Kunz was Director of the Department of Public Work of Jersey City. All public works contracts were supervised by his department. Di Feo testified that Kunz ordered the cars for the Jersey City Sewerage Authority on which he paid Flaherty a 10%

kickback. The evidence established that on every public works contract let by the Public Works Department a kickback was exacted. The witness Dolan testified that when he became Chief Engineer of that Department Kunz told him that he was not to issue plans and specifications to any contractors without prior clearance from Murphy (Tr. 3246-48). Even though Dolan believed it was his function as Chief Engineer to prequalify contractors, he followed Kunz's instructions. The evidence established that Murphy's pre-qualification consisted of the exaction of an agreement upon a 10% kickback. Kunz asserts that none of the above evidence establishes his knowledge of or participation in the conspiracy. But it is established in the record that neither Kunz nor any other of the defendants would have been in the public positions which they held without the approval of the system's head, J. V. Kenny. In 1969 Kunz was promoted from Director of the Department of Public Works to Business Administrator. After it was public knowledge that the federal grand jury was investigating Jersey City and Hundson County Kunz, the City Business Administrator, called Dolan to his office and this conversation ensued:

> "The Witness [Dolan]: Mr. Kunz asked me to come down to his office, which I did do. We discussed several aspects of City business and then he asked me if I had heard the latest about Mario Gallo.
> I said to him, 'No, what is the latest about Mario Gallo?'
> He said, 'They found him with a rope around his neck, the same thing could happen to you or to anyone else who talks about what is going on in Jersey City.'" (Tr. 3326).

We cannot say that the foregoing evidence, looked at most favorably to the Government, does not support the jury verdict against Kunz. *See United States v. Alper*, *supra.* at 1227.

VI. The Suppression Motion At Trial

We have discussed heretofore *supra*, P. 38, the contention that a warrant search of the offices of Kropke and Stapleton was not supported by an adequate warrant. At trial the defendant Stapleton moved to suppress the testimony of the witnesses Schuster and Roetman on the ground that it was the fruit of an illegal search. Fed. R. Crim. P. 41(e)(4); *Wong Sun v. United States*, 371 U.S. 471 (1963). The court heard argument on the motions and declined to hold an evidentiary hearing.

Schuster, an employee of Standard Bithulitic, a division of Ashland Oil Co., appeared before the federal grand jury on September 23, 1970 pursuant to a subpoena. He had not previously been in touch with any government agent. His testimony on September 23, 1970 was limited to the structure of Standard Bithulitic and Warren Brothers, and to the indentity of various corporate officers.

On October 7, 1970 Kropke appeared at Schuster's office, identified someone, falsely, as Wolfe, and attempted to see Schuster for the purpose of returning to Schuster $9,000 out of $10,000 which had been extorted from Schuster's company, and of explaining that the "dinner tickets" which the company purchased were only $100 each, not $1,000 each. He saw Schuster's secretary, Roetman, made known the purpose of the call, but since Schuster wasn't available, did not deliver the money. The money later was seized in Stapleton's office.

Prior to October 8, 1970 Schuster gave the United States Attorney the information about Kropke's approach. (Tr. 2526, 2530, 2537). The affidavit in support of the search warrant for Stapleton's office is dated October 8, 1970. (Appellants' Appendix 265). The warrant issued on October 8, 1970 (Appellants' Appendix 267) and was executed the same day. Thereafter on November 11, 1970 Schuster appeared before the grand jury and testified about the conspiracy.

The trial court declined to hold an evidentiary hearing because rather than Schuster's and Roetman's testimony being the fruit of the search it was clear in the record that the search was the fruit of the information disclosed, prior thereto, by Schuster. (Tr. 2556-63). The exclusionary rule operates on the fruits of the search, not the seeds.

VII. The Trial Court's Attitude

Appellant Murphy, in particular, and all of the appellants to some degree, assert that the trial judge throughout the trial manifested by his attitude toward defense counsel such extreme hostility and prejudice as to deprive them of a fair trial. From our trial judges we require basic fairness. We desire equanimity. We cannot expect perfect sanctity. No record of over seven thousand pages of a hard fought trial has ever been created in which, removed from the overall context, an appellate court could not isolate occasional indications of impatience or even irritability. This entire record is remarkably free from such indications, and to the extent they do exist they show an even handed effort on the part of the trial court to keep both the government attorneys and the defense attorneys within appropriate bounds. This was a long and hard fought trial before a sequestered jury. The court's efforts to prevent its undue prolongation were proper. *See, e.g., United States v. Murray*, 445 F.2d 1171, 1176 (3d Cir. 1971) and cases cited. The incidents of which the appellants, especially Murphy, complain, were directed principally to that end. The entire record discloses that the appellants, including Murphy, received a basically fair trial.

VIII. The Government's Comments During Summation

The appellants complain that a part of the Government's summation was improper. The part complained of reads:

> "The first count of this indictment charges that from at least as early as November 1963 the defendants now

on trial before you and the other defendants who were severed and other people who are unknown to the Grand Jury entered into a combination, kind of system, under which contractors, engineers, suppliers, anybody who wanted to do business in Jersey City or Hudson county was required to pay tribute, to kick-back. You have seen during the course of this trial a number of contractors take the witness stand and testify to exactly that. You have seen two men who were part and parcel with these other men at one time, and they were not talking about them the way they talked about them in the past few days several years ago when they were occupying the adjoining offices. You have seen them take the stand and tell you what was going on, not in Runnymede but in Jersey City and Hudson County, and I suppose the most shocking thing of all about this trial is that in seven full weeks *you have not heard a single contractor take the stand, not a single engineer, not a single supplier take the stand and say, 'I did business in Jersey City, in Hudson County and I didn't have to kick-back.'* " (Tr. 6637) (emphasis added)

The Government witnesses testified that under the system of which they and the defendants were part *every* contractor doing business with the city had to kick back 10% of the contract price. Numerous contractors and suppliers corroborated this testimony by proof of kick backs they made. The defendants were in a position to know of other contractors who did business with the city, and these contractors were certainly within reach of the court's process. None were called. The comment on their absence was appropriate:

". . . The rule even in criminal cases, is that, if a party has it particularly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the pre-

sumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893).

See also United States v. Restaino, 369 F.2d 544, 547 (3d Cir. 1966); *United States v. Lowe*, 234 F.2d 919 (3d Cir. 1956), *cert. denied*, 352 U.S. 838 (1956).

IX. The Court's Charge

One or more of the appellants urge that the court's charge was deficient in one respect or another. Most of these contentions were not called to the attention of the trial court after the charge and before the jury retired to deliberate and hence may not be assigned as error here. Fed. R. Crim. P. 30. Other matters were called to the trial court's attention and were in fact corrected. *See, e.g.*, p. 35 *supra* dealing with Di Feo's testimony.

Kropke did take exception to the trial court's definition of extortion under 18 U.S.C. § 1951. The instruction given reads:

> "The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. The term 'fear', as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or of a threatened loss.
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> • • •
>
> Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. You will note that extortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed." (Tr. 6773-74).

Kropke's objection is that the quoted instruction defines Hobbs Act extortion disjunctively; that is, obtaining money or property either by use of fear or under color of official right.

In *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), which also involved extortion by public officials, the case was submitted to the jury only on a use of fear theory. It has been held that the "under color of official right" language may have no applicability to extortionate acts committed by private individuals. *Bianchi v. United States*, 219 F.2d 182, 192 (8th Cir. 1955), *cert. denied*, 349 U.S. 915 (1955). But while private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term "extortion" is defined in §1951(2):

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress. *See, e.g. United States v. Nardello*, 393 U.S. 286, 289 (1969); *United States v. Sutter*, 160 F.2d 754, 756 (7th Cir. 1947); *State v. Begyn*, 34 N.J. 35, 167 A.2d 161 (1961); *State v. Weleck*, 10 N.J. 355, 371 (91 A.2d 751, 759-60 (1952). The disjunctive charge on §1951 extortion was correct.

Appellant Kunz complains that the court did not in its charge sufficiently marshal the evidence applicable to him. He did not request that this be done, undoubtedly because his attorney did so skillfully, presenting the evidence against him in its most favorable light.

X. Sternkopf's Sentence

Sternkopf contends that the $20,000 fine imposed on him was improper because the sentence was a general one and the maximum on any single court was $10,000.00. He cites no authority for this proposition. The maximum fine in a general sentence may be determined by aggregating the maximum under each valid count. *See e.g., Peoples v. United States*, 412 F.2d 5, 6 (8th Cir. 1969); *United States v. Woykovsky*, 297 F.2d 179, 181 (7th Cir. 1961), *cert. denied*, 369 U.S. 872 (1962); *Robles v. United States*, 279 F.2d 401, 407 (9th Cir. 1960), *cert. denied*, 365 U.S. 836 (1961). In *United States v. Rose*, 215 F.2d 617, 630 (3d Cir. 1954) we said "We are strongly of the opinion that it is highly desirable that the trial judge in imposing sentence on an indictment containing more than one count deal separately with each count." The affirmance should not be construed as any change in our view as to the desirability of separate treatment.

The judgments appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

STATUTES

18 U.S.C. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. §1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to–

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, §1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.